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11 **UNITED STATES DISTRICT COURT**

12 **EASTERN DISTRICT OF CALIFORNIA**

13 WARIS GILDERSLEEVE, ) Case No.: 2:22-cv-02145-JAM-AC

14 Plaintiff, )

vs. ) **MEMORANDUM OF POINTS AND  
CITY OF SACRAMENTO, et al., ) AUTHORITIES IN SUPPORT OF  
Defendants. ) DEFENDANTS' MOTIONS FOR  
DATE: June 17, 2025  
TIME: 1:00 p.m.  
COURTROOM: 6**

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1 This memorandum supports three motions: (1) by Brian Brust for summary judgment; (2) by  
2 David Lauchner for summary judgment; and (3) by City of Sacramento for partial summary  
3 judgment. None challenge whether Gildersleeve encountered a racially-hostile environment *per*  
4 *se*. Rather, the City attacks his disparate treatment claims, whereas Brust and Lauchner address  
5 their alleged contributions to the racial hostility.

## I. THE AVERMENTS HERE CHALLENGED

## A. MOVANTS NEED DEFEAT SOLELY WHAT IS PLED

As a summary judgment motion tests the complaint's factual averments, the plaintiff may not oppose the motion by asserting unpled acts or events. *Pickern v. Pier 1 Imps. (U.S.), Inc.*, 457 F.3d 963, 969 (9th Cir. 2006) (complaint's vague reference to "may include, but is not limited to" certain types of building barriers insufficient to justify specific barrier facts asserted in opposition papers). A limited exception exists where the plaintiff clearly articulates during discovery an intention to pursue recovery on that unpled theory, though whether such notice suffices absent a successful concurrent motion to amend is unclear. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000).

The motion may negate the factual averments in two manners: (1) by affirmatively demonstrating their falsity through citation to contrary evidence; and/or (2) for those facts the movant lacks the burden of establishing at trial, by asserting the absence of evidence supporting the averment, in which case the burden shifts to the plaintiff to offer supporting proof. F.R.C.P. Rule 56(c)(1); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1261 (9th Cir. 2016) (the movant “must either produce evidence establishing [its defense] or show, through argument, that the plaintiff does not have enough evidence to establish [claim element]. . .Where the defendant meets that burden, the burden then shifts to the plaintiff to designate specific facts demonstrating the existence of genuine issues for trial”).

## **B. SUMMARY OF FACTUAL ALLEGATIONS AND CLAIMS FOR RELIEF**

27       Despite the complaint's organization that identifies just three claims for relief, it potentially  
28      pleads six distinct theories of liability: (1) racially disparate treatment by City of Sacramento and

1 “Does” in violation of Title VII (42 U.S.C. § 2000e) (First); (2) racial harassment by City of  
2 Sacramento and “Does” in violation of Title VII (42 U.S.C. § 2000e) (First); (3) racially disparate  
3 treatment by all Defendants in violation of Cal. Government Code § 12900 (Second); (4) racial  
4 harassment by all Defendants in violation of Cal. Government Code § 12900 (Second); (5) failure  
5 by City of Sacramento and “Does” to prevent racial discrimination, in violation of Cal.  
6 Government Code § 12940(k) (Third); and (6) failure by City of Sacramento and “Does” to prevent  
7 racial harassment, in violation of Cal. Government Code § 12940(k). (ECF # 4, ¶¶ 29-37.)

8       The supporting facts (or conclusions where facts are absent) alleged are:

9           (a) Gildersleeve commenced working for City as a fire prevention officer, then chose to  
10 enter the largely white fire suppression department, commencing his year-long probationary term  
11 in March, 2020 and thereafter rotating among several stations (*id.*, ¶¶ 13-15);

12           (b) during his probationary period, Gildersleeve directly heard: (i) a white “acting” (i.e.,  
13 temporary) captain curse Black Lives Matter while watching a media news report (¶ 16); (ii) a  
14 white co-worker “utter a form of the N-word” (*id.*); (iii) white firefighters at Station 6, including  
15 Captains Brust and Lauchner, “treated the other Black firefighter dismissively” and ostracized him,  
16 then did the same to Gildersleeve, yet not to the white probationary firefighter (¶ 18); (iv) white  
17 employees yelled and cursed at him while unfairly criticizing his work (¶¶ 19, 21); (v) Brust and  
18 Lauchner observed, but made no effort to curtail, that yelling and cursing at Gildersleeve, and also  
19 undeservedly critiqued Gildersleeve’s performance (¶¶ 18-21); (vi) firefighters sometimes better  
20 treated white reporting citizens versus black citizens (¶ 19); and (vii) Lauchner cursed and yelled  
21 at Gildersleeve for not disposing of trash and for wearing a “Fire Prevention” patch on his jacket,  
22 which scolding Brust observed but did not correct, and “wrote up” Gildersleeve for the matters (¶  
23 22);

24           (c) also during his probationary period, Gildersleeve was told by black firefighters about  
25 various racially offensive remarks or mistreatment by white firefighters (¶ 17);

26           (d) Brust refused to approve Gildersleeve’s transfer to a different station, citing his  
27 deficient performance and “write ups,” but Chief Helvin overruled Brust, enabling Gildersleeve to  
28 timely transfer (¶¶ 23-24);

(e) post-transfer, Brust and Lauchner “disparaged Gildersleeve’s abilities” to his new captains despite that his prior failings stemmed from his receipt of outdated study materials (¶ 25); and

(f) six weeks later, Gildersleeve injured his shoulder during water rescue training due to leaky equipment knowingly given him by Lauchner (¶ 27).

Even read in context with the preceding factual averments, the charging averments leave indeterminate whether Gildersleeve asserts (a) City allowed a racially-hostile atmosphere to exist, which situation qualifies as a type of discrimination, rendering harassment and discrimination here synonymous (which would better explain the three-claim organization), or rather (b) that he both encountered a hostile environment and also was otherwise disparately treated due to his race. During the requisite pre-motion meeting of counsel, Gildersleeve's attorney confirmed that he intends (b), meaning six claims exist.

## **II. FACTS AS SHOWN BY EVIDENCE**

## A. DISPARATE TREATMENT

Gildersleeve has been employed by City since about 2005. (*Ex. A*, p. 13:12-15.) After a short stint as a plumbing inspector, he became a fire prevention officer and remained in that department until 2019. (*Id.* at 13:16 – 14:9, 17:18-20.) At that time, he entered the fire suppression academy. (*Id.* at 23:19 – 24:1.) Upon graduation, he became a probationary firefighter, assigned initially to Station 43, then to Station 4, to 15, to 6, and finally at 2. (*Id.* at 85:10 – 86:4, 128:19-24.) He encountered no racial obstacles/problems at Stations 43, 4, and 2. (*Id.* at 86:14-25, 196:18-20.) Brust and Lauchner were Captains at Station 6. (*Id.* at 166:15 – 168:17.) Although Captain Brust opposed Gildersleeve’s rotation from Station 6 to Station 2, Chief Helvin approved it on the ground he disagreed with the criticisms of Gildersleeve’s progress. (*Id.* at 192:4 – 194:16.) Upon arrival at Station 2, its captains assured Gildersleeve they would disregard prior criticisms of his work. (*Id.* at 195:8 – 196:5.)

In January 2021, while still at Station 2, Gildersleeve participated in water rescue training. (*Id.* at 198:12-24.) Captain Lauchner participated by issuing trainees dry suits and instructing on their proper fastening. (*Id.* at 199:9 – 200:13.) Gildersleeve asked for size extra large and Lauchner

1 handed him one from a number of suits hanging nearby – Gildersleeve’s suit was not pre-marked  
2 as specifically for him. (*Id.* at 199:19 – 200:21.) Upon entering the water, the suit began to leak,  
3 so Gildersleeve exited the river, had the suit drained, and Lauchner “went to his truck and grabbed  
4 me another suit,” which also leaked. (*Id.* at 202:4 – 203:2.) Gildersleeve nonetheless decided to  
5 proceed with training without disclosing the second leak and, due to the extra water inside the suit,  
6 got stuck under a pipe and injured his shoulder. (*Id.* at 203:3 – 205:25.) Gildersleeve concludes  
7 Lauchner either knew the suits were defective or else lacked the requisite familiarity with the  
8 equipment. (*Id.* at 206:8 – 207:2.) Gildersleeve received workers compensation benefits and  
9 underwent treatment. (*Id.* at 208:8 – 209:10.) He later elected to return to fire prevention and, in  
10 2023, became a senior fire prevention officer for construction plan review. (*Id.* at 22:20 – 23:15,  
11 128:7-14.) He resumed full-time duties in 2024. (*Id.* at 210:1-24.)

12 During his deposition, Gildersleeve examined and testified about his work records  
13 pertaining to his probationary fire prevention term. (*See Ex. A,* at 175:25 – 176:7.) Those records  
14 contain numerous performance grades and daily evaluations but just a single disciplinary warning  
15 (styled “Notice of Correction”) regarding knot-tying deficiencies – issued by Captain Budd while  
16 supervising Gildersleeve at Station 4. (Ex. B, p. 36.) No discipline, or even mention, exists for the  
17 failure to remove the box or wearing a fire prevention patch events at Station 6. (Ex. B. *See Ex.*  
18 A, at 172:6 – 173:3 [admitting the admonishment might not have been written and indicating  
19 inability to find any such writing in his records].)

20 **B. HOSTILE ENVIRONMENT – BRUST AND LAUCHNER**

21 In deposition, Gildersleeve identified two reasons for suing Brust: (1) telling Gildersleeve  
22 on several occasions “that sounds like an excuse to me” in response to Gildersleeve’s proffered  
23 justification for a perceived performance flaw (Ex. A, p. 215:2-12); and (2) failing to correct others  
24 who he heard curse/berate Gildersleeve (*id.* at 216:25 – 218:5). (*See also id.* at 224:14-17.)

25 As to Lauchner, Gildersleeve explained that Lauchner was never “warm” with him and  
26 uniquely scolded and tested him, which disparity Gildersleeve “felt” was racial. (*Id.* at pp. 224:18-  
27 225:18 – 226:23, 227:19 – 228:9.) Lauchner also acted dismissively toward Joe Hunter, another  
28 black firefighter, by not verbally acknowledging Hunter’s statements during dinner conversation.

1 (Id. pp. 228:22 – 229:19. See also id. at 230:20-24.)

### 2 **III. CITY DID NOT ACT ADVERSELY TO GILDERSLEEVE**

#### 3 **A. GOVERNING LEGAL PRINCIPLES**

4 To state a *prima facie* case of disparate treatment discrimination under Title VII and under  
 5 FEHA, the plaintiff must present evidence (1) he belongs to a protected class; (2) he was qualified  
 6 for his position; (3) he was subject to an adverse employment action; and (4) similarly situated  
 7 individuals outside his protected class were treated more favorably. *Davis v. Team Elec. Co.*, 520  
 8 F.3d 1080, 1089 (9th Cir. 2008); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1219 (9th Cir.  
 9 1998) (“California law under the FEHA mirrors federal law under Title VII”).

10 As to the third element, an adverse employment action is one that “materially affect[s] the  
 11 compensation, terms, conditions, or privileges of . . . employment.” *Davis*, 520 F.3d at 1089. A  
 12 low performance review, standing alone, without impact on the compensation, terms, conditions,  
 13 or privileges of employment does not amount to an adverse employment action. *Spokoiny v. Univ.*  
 14 *of Wash. Med. Ctr.*, 2025 U.S. App. LEXIS 5698, at \*3 (9th Cir. Mar. 10, 2025); *Lucas v. Chi.*  
 15 *Transit Auth.*, 367 F.3d 714, 731 (7th Cir. 2004) (“[t]here must be some tangible job consequence  
 16 accompanying the reprimand to rise to the level of a material adverse employment action;  
 17 otherwise every reprimand or attempt to counsel an employee could form the basis of a federal  
 18 suit”). Should the plaintiff fail to state a *prima facie* case, the employer may prevail on that basis  
 19 alone. *Caldwell v. Paramount Unified School Dist.*, 41 Cal.App.4th 189, 202 (1995)  
 20 (“{c}ommonly, an employer will seek summary judgment, arguing that the plaintiff has not  
 21 satisfied one of the four elements of the *prima facie* case and thus is not entitled to proceed to  
 22 trial”). See *Goodwin*, 150 F.3d at 1220 [applying *McDonnell-Douglas* burden-shifting test to  
 23 FEHA claims re summary judgment].

#### 24 **B. NO MATTER COMPLAINED ABOUT AND EVIDENCED HANDICAPPED GILDERSLEEVE**

25 Notably absent here is a typical adverse employment event, such as termination, demotion,  
 26 pay reduction, or suspension. Instead presented is a probationary firefighter who progressed  
 27 through his station rotations but failed to matriculate solely due to a workplace injury, after which  
 28 he continued employment with City in his prior department and eventually promoted. His single

1 demerit, from Captain Budd, he does not attribute to race. Moreover, he admits that, upon arrival  
2 at Station 2, his slate was “wiped clean,” i.e. that any prior negative marks or criticisms were  
3 obviated. Regardless, the “needs improvement” grades he received came from each station and  
4 would not have ultimately impacted his ability to pass probation, as forcefully illustrated by  
5 Captain Henley’s disagreement with some of the negative marks in approving his continued  
6 rotation. (*See further Declaration of Josh Calista, ¶¶ 2-4. See also Ex. A, p. 248:7-20 [stating he*  
7 *was told “needs improvement” grades were typical during probation].)*

8 Similarly, even assuming an inability to rotate from one station to another during probation  
9 could be deemed materially “adverse,” Gildersleeve did timely move to Station 2. Unlike criminal  
10 law, no Title VII liability exists for “attempted” punitive employment events that fail to actually  
11 detriment the employee.

12 Although Gildersleeve asserts Lauchner indirectly caused his shoulder injury by knowingly  
13 giving him leaky suits, his view rests on faulty speculation rather than any potentially admissible  
14 evidence of ill intent. Ironically, Gildersleeve acknowledges that Lauchner might not have  
15 possessed the skill level necessary to properly gauge the suits. Gildersleeve also ignores other  
16 potential (and more plausible) scenarios, such as that someone else examined the suits prior to  
17 Lauchner’s random distribution, or that Gildersleeve didn’t correctly secure/fasten the suits before  
18 his water entry.

19 Due to the absence of an adverse action, the “discrimination” prongs of the First, Second,  
20 and Third claims fail to warrant a trial.

21 **C. NO INDIVIDUAL LIABILITY IS POSSIBLE**

22 Regardless of adverse action, neither Title VII nor FEHA recognizes individual liability  
23 for disparate treatment discrimination. *Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995)  
24 (“[u]nder Title VII there is no personal liability for employees, including supervisors such as  
25 McMillin,” citing *Miller v. Maxwell's Int'l*, 991 F.2d 583, 587 (9th Cir. 1993); *Jones v. Lodge at*  
26 *Torrey Pines Partnership*, 42 Cal.4th 1158, 1164 (2008) (chronicling prior such holdings).  
27 Accordingly, Brust and Lauchner are not proper defendants to the discrimination aspect of the  
28 Second claim.

1           **IV. THE HOSTILE ENVIRONMENT CLAIMS AGAINST BRUST AND LAUCHNER**  
 2           **LACK LEGAL AND FACTUAL FOUNDATIONS**

3           Defendants do not read the FAC as alleging Title VII liability against Brust and Lauchner,  
 4 nor could it. *See further Coffin v. Safeway, Inc.*, 323 F. Supp. 2d 997, 1001 (D. Ariz. 2004)  
 5 (applying several Ninth Circuit Title VII opinions to dismiss sex harassment claim against  
 6 supervisor). Although such individual liability can lie under FEHA, Gildersleeve lacks the  
 7 requisite facts.

8           **A. GOVERNING LEGAL PRINCIPLES**

9           The elements of a hostile environment violation of § Cal. Government Code 12940(j) are:  
 10 plaintiff was subjected to harassing conduct that was (1) unwelcome; (2) because of race; and (3)  
 11 sufficiently severe or pervasive to alter the conditions of his employment and create an abusive  
 12 work environment. *Bailey v. S.F. Dist. Attorney's Office*, 16 Cal.5th 611, 627 (2024). A co-  
 13 employee or supervisor may be held individually liable for his/her own harassing conduct, or for  
 14 affirmatively aiding and abetting harassment by others, but not for inaction. *Fiol v. Doellstedt*, 50  
 15 Cal. App. 4th 1318, 1326 (1996) (“We next consider whether the supervisor is personally liable  
 16 under the FEHA, as an aider and abettor of the employer, for failing to prevent sexual harassment.  
 17 We conclude the supervisor is not.”) As summarized in *Fiol*, at 1327:

18           The case and statutory authority set forth three clear rules. First, under *Page*, a  
 19 supervisor who personally engages in sexually harassing conduct is personally  
 20 liable under the FEHA. Second, under Matthews, if the supervisor participates in  
 21 the sexual harassment or substantially assists or encourages continued harassment,  
 the supervisor is personally liable under the FEHA as an aider and abettor of the  
 harasser.

22           As to whether affirmative misconduct by a supervisor “substantially” aids and/or abets  
 23 racial hostility, principles concerning the severity of racial hostility are instructive. For the degree  
 24 of severity, physically threatening or humiliating conduct connotes greater severity than a mere  
 25 offensive statement. *Etter v. Veriflo Corp.*, 67 Cal.App.4th 457, 467 (1998) (applying sexual  
 26 harassment principle to race claim); *Herberg v. California Institute of the Arts*, 101 Cal.App.4th  
 27 142, 150 (2002) [citing *Etter*]. For verbal conduct, explicit propositions or epithets are more

1 extreme than other verbal abuse. *Porter v. Calif. Dept. of Corrections*, 419 F.3d 885, 892 (9th Cir.  
 2 2005). Crude jokes and offensive (but not humiliating) language carry the least severity because  
 3 they are “ordinary tribulations of the workplace.” *Faragher v. City of Boca Raton*, 524 U.S. 775,  
 4 788 (1998); *Dominguez-Curry v. Nev. Transp. Dep’t*, 424 F.3d 1027, 1034 (9th Cir. 2005) (“Simple  
 5 teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to  
 6 discriminatory changes in the terms and conditions of employment”); *Burnett v. Tyco Corp.*, 203  
 7 F.3d 980, 982 (6th Cir. 2000) [distinguishing between humiliating vs. offensive utterances].)  
 8 Similarly, conduct bias-neutral on its face is disregarded where the inference of illicit motive is no  
 9 more reasonable than a neutral explanation. See *Campbell v. State Dep’t of Educ.*, 892 F.3d 1005,  
 10 1020 (9th Cir. 2018); *Thompson v. City of Monrovia*, 186 Cal. App. 4th 860, 877 (2010). Finally,  
 11 normal managerial decisions, such as task/office/duty assignments, do not qualify as harassment  
 12 based on an alleged biased origin. *Reno v. Baird*, 18 Cal.4th 640, 646–647 (1998).

13 **B. GILDERSLEEVE’S TESTIMONY CONDEMNS LIABILITY**

14 In deposition, Gildersleeve confirmed that the *gravamen* of his suit against Brust and  
 15 Lauchner lies in their failures to stop abuse by other firefighters. As FEHA does not recognize  
 16 supervisor harassment liability for nonfeasance, left are scattered acts that fail both singularly and  
 17 collectively to qualify as “substantially” aiding harassment by others:

18 (1) Lauchner “wrote up” Gildersleeve for his jacket patch and non-disposal of the box – no  
 19 such written admonishment occurred; nothing about Gildersleeve’s description of the conversation  
 20 suggests a racial component; and, regardless, such discipline would constitute a managerial  
 21 function;

22 (2) Lauchner knowingly gave Gildersleeve faulty dry suits – no evidence suggests such  
 23 knowledge (indeed far more plausible reasons for the leakage exist), and, again, the incident was  
 24 racially-neutral on its face;

25 (3) Lauchner didn’t “warmly” interact with Gildersleeve and acted “dismissively” toward  
 26 Joe Hunter via not verbally reacting to him – these impressions are subjective conclusions rather  
 27 than objective facts and, again, are facially neutral as to race. Also, not verbally responding to  
 28 Hunter equates to non-feasance rather than malfeasance;

1                             (4) Brust's verbal expressions of non-acceptance as to Gildersleeve's proffered reasons for  
2 perceived performance flaws constituted managerial functions and, yet again, were racially  
3 neutral; and

4                             (5) Brust and Lauchner denigrated Gildersleeve's work abilities to the Station 2 captains –  
5 this vaguely-described conversation was also managerial in nature, racially-neutral, and, by  
6 Gildersleeve's own admission, did not create or enhance racial hostility because he wasn't  
7 harassed at Station 2.

8                             Alternatively as to #s 1 and 3-5, even if one or more of these matters possessed individual  
9 viability, their status as merely verbal and facially race-neutral utterances places them at the lowest  
10 rung of the harassment severity level, squarely in the non-actionable "ordinary workplace  
11 tribulation" category.

12                             **V. THE FAILURE TO PREVENT DISCRIMINATION CLAIM SHOULD FAIL WITH  
13                                     SUMMARY JUDGMENT OF THE UNDERLYING CLAIM**

14                             "An actionable claim under section 12940, subdivision (k) is dependent on a claim of actual  
15 discrimination." *Scotch v. Art Institute of California*, 173 Cal.App.4th 986,1021 (2009). That  
16 means, absent proof of underlying discrimination no claim for a failure to prevent discrimination  
17 can be stated. *Dickson v. Burke Williams, Inc.*, 234 Cal.App.4th 1307, 1315-1316 (2015). As such,  
18 Gildersleeve's claim for failure to prevent discrimination fails for the same reasons his  
19 aforementioned FEHA discrimination claim against the City fails.

20                             **VI. CONCLUSION**

21                             Defendants acknowledge the presence of triable issues regarding the hostile environment  
22 claims against City – the parties sharply disagree about what actually happened. In contrast, the  
23 disparate treatment claims and California FEHA claims against the individual defendants fail as a  
24 matter of law even using Gildersleeve's own testimony. The City never punished him as an  
25 employee, which he remains to this day, and the purported sins of Brust and Lauchner were *de  
26 minimis* and/or imagined.

27

28

1 Dated: April 14, 2025

ANGELO, KILDAY & KILDUFF, LLP

2 */s/ Serena M. Warner*

3 By: \_\_\_\_\_

4 SERENA M. WARNER  
5 ETHAN J. ZERTUCHA  
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7 CITY OF SACRAMENTO, BRIAN  
8 BRUST, AND DAVID LAUCHNER

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